United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2191

B
P/S

United States Court of Appeals

For the Second Circuit

No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

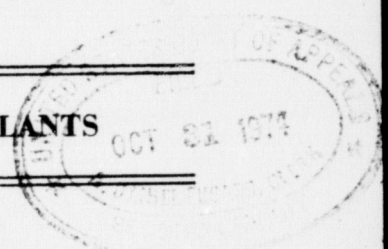
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR PLAINTIFFS-APPELLANTS

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, ESQS.
1370 Avenue of the Americas
New York, New York 10019
(212) 757-4000

KANE & KOONS, ESQS.
1100 Seventeenth Street
Washington, D.C. 20036
(202) 659-2044
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

	PAGE
Issues Presented	1
Statement of the Case	2
Proceedings Below	2
Facts	4
ARGUMENT—POINT I—The Court Below Erred In Holding That Footnote 20 In *Aiello* Required The Conclusion That, Absent Invidious Discrimination, Classifications Based Upon Pregnancy Are Never Sex-Based, Regardless Of Differences in Statutes Involved, Legislative Objectives And Factual Contexts	9
A. The Decision In *Aiello* Demonstrates That Footnote 20 Must Be Carefully Kept Within Its Particular Facts	10
(1) Because the particular facts involved in *Aiello* were critical to the decision, the impact of the opinion must be limited to comparable facts	10
(2) The Supreme Court does not construe statutes not before it for review	14
B. In Any Event, Footnote 20 Merely Declares That Classifications Based Upon Pregnancy Are Not *Necessarily* Sex-Based, And Specifically Permits The Legislature To Make A Determination That Such Classifications Are Sex-Based	18
C. The References In Footnote 20 to *Reed* And *Frontiero* Indicate The Importance Of Proffered Legislative Objectives In Determining Whether Differential Treatment Is Based On "Gender As Such"	19

PAGE

POINT II—The Court Below Erred In Failing To Consider The Differences Between The Facts Herein And Those Relied Upon In *Aiello* And In Failing To Reach The Issue Of Whether Long Lines' Policies Discriminated In Terms And Conditions Of Employment In Violation Of the Act .. 22

A. Long Lines' Disability Plan And Policies Significantly Differ From That Considered In *Aiello* In Structure, Funding, Cost And Impact 22

B. Long Lines' Disability Plan And Policies Are Terms And Conditions Of Employment Within The Scope Of Section 703(a) Of Title VII 25

POINT III—The Court Below Erred In Failing To Consider The Congressional Intention in Title VII To Eliminate Sex Discrimination In Terms And Conditions Of Employment Which Included Discrimination Based Upon Pregnancy, An Inclusion Recognized By *Aiello* As Appropriate For The Legislature To Make 26

A. Congress Intended Title VII's Prohibition Against Sex Discrimination To Include All Facets Of The Employment Relationship .. 27

B. The EEOC Determination That Differential Treatment Of Pregnancy By An Employer Violates Title VII Expressed The Intention Of Congress to Prohibit Such Conduct 29

POINT IV—The Court Below Erred In Failing To Consider Title VII Standards In Order To Determine Whether Long Lines' Policies Constituted Impermissible Sex Discrimination 33

PAGE

A. Long Lines' Disparate Treatment of Women Disabled By Pregnancy Is A *Prima Facie* Violation Of Title VII 33

B. *Aiello* Involved Presumptions And Burdens Of Proof Entirely Different And Less Stringent Than Those Applied Under Title VII 37

C. "Pretexts For Invidious Discrimination" In The Context Of *Aiello* Are Very Different Under Title VII Where Motive And Intent Have Limited, If Any, Relevance 41

D. Title VII Has Been Consistently Construed As Prohibiting Classifications Which May Not Violate The Fourteenth Amendment .. 42

CONCLUSION 45

TABLE OF AUTHORITIES

CASES:

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 15

Armbruster v. *Crouse Ir ng Mem. Hospital*, Case No. CS-28495-72 (New York State Div. of Human Rights, Feb. 27, 1974) 16

Armour Company v. *Wantock*, 323 U.S. 126 (1944), *reh. den.* 323 U.S. 818 (1945) 11

Bartmess v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186 (7th Cir. 1971), *cert. den. sub. nom., Drewrys U.S.A. Inc.* v. *Bartmess*, 404 U.S. 939 (1971) ... 25, 31

Black v. *School Committee of Malde*, 8 FEP Cases 132 (Mass. Sup. Jud. Ct. 1974) 16

Bowe v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969) 43

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 15

PAGE

Cabell v. *Markham*, 148 F. 2d 737 (2d Cir. 1945), *aff'd* 326 U.S. 404 (1945) 15
Cameron v. *Mullen*, 387 F. 2d 193 (D.C. Cir. 1967) 12
Cedar Rapids School Dist. v. *Parr*, 6 FEP Cases 101 (D. Iowa 1973) 17
Chappell & Co. v. *Frankel*, 367 F. 2d 197 (2d Cir. 1966) 15
Cohens v. *Commonwealth of Virginia*, 6 Wheat. 624, 19 U.S. 264 (1821) 12
Commissioner of Internal Revenue v. *Marshall*, 125 F. 2d 943 (2d Cir. 1942) 12
Communications Workers of America, et al. v. *New York Telephone Co., et al.*, Index No. 73-3352 H.R.T. (S.D.N.Y.) 4

Dandridge v. *Williams*, 397 U.S. 471 (1970) 21, 37, 43
Dessenberg v. *American Metal Forming Co.*, 8 FEP Cases 290 (N.D. Oh. 1973) 17, 26
Diaz v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971), *cert. den.* 404 U.S. 950 (1971) 31, 36
Doe v. *Osteopathic Hospital of Wichita, Inc.*, 333 F. Supp. 1357 (D. Kan. 1971) 36
Drake v. *Covington Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974) 15, 36, 37

Eck v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2d Cir. 1966) 15
Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 37
E.E.O.C. v. *A.T.&T. Co.*, 365 F. Supp. 1105 (F.D. Pa. 1973) 7
Espinoza v. *Farah Manuf. Co.*, 414 U.S. 86, 38 L.Ed. 2d 287 (1973) 17, 32, 38

Farkas v. *Southwestern City School Dist.*, 8 FEP Cases 288 (S.D. Oh. 1974) 17, 26

PAGE

F.T.C. v. *Meyer*, 390 U.S. 341 (1968) 14
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 15, 19, 20,21

Garneau v. *Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971) 43
Geduldig v. *Aiello*, 94 S.Ct. 2485 (1974) .....1, 2, ?, 4, 8, 9, 10, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 34, 35, 37, 38, 39, 41, 42, 44
Gilbert v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974) 6, 17, 23, 25, 26, 31, 32, 34, 37, 39, 40, 44
Goesaert v. *Cleary*, 335 U.S. 464 (1948) 43
Green v. *Waterford Board of Educ.*, 473 F. 2d 629 (2d Cir. 1973) 31, 39
Gregory v. *Litton Systems, Inc.*, 472 F. 2d 631 (9th Cir. 1972) 40
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) . .31, 33, 38, 39, 41, 42
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 37

Hackett v. *McGuire Brothers, Inc.*, 445 F. 2d 442 (3d Cir. 1971) 25
Haberman v. *Finch*, 418 F. 2d 664 (2d Cir. 1969) .. 15
Hanson v. *Hutt*, 83 Wash. 2d 195, 517 P. 2d 599 (S.Ct. Wash. 1973) 17, 37
Harkless v. *Sweeny Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), *cert. den.* 400 U.S. 991 (1971) 13
Head v. *Timkin Roller Bearing Co.*, 486 F. 2d 870 (6th Cir. 1973) 40
Heart of Atlanta Motel v. *United States*, 379 U.S. 241 (1964) 14
Hudson Distributors v. *Eli Lilly Co.*, 377 U.S. 386 (1964) 14
Hutchison v. *Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974) 17, 26, 39, 44

PAGE

Irwin v. *Simmons*, 140 F. 2d 558 (2d Cir. 1944) ... 12

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 21

John Hancock Mut. Life Ins. Co. v. *Bartels*, 308 U.S. 180 (1939) 13

Jones v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), *cert. den.* 401 U.S. 923 (1971) 41

Kahn v. *Shevin*, 94 S.Ct. —, 40 L.Ed 2d 189 (1974) 34

Kober v. *Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd* 480 F. 2d 240 (3d Cir. 1973) 41

Krause v. *Sacramento Inn*, 479 F. 2d 988 (9th Cir. 1973) 43

LeBlanc v. *So. Bell Telephone and Telegraph Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd* 460 F. 2d 1228 (5th Cir.), *cert. den.* 409 U.S. 990 (1972) 43

Leisner v. *N.Y. Telephone Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973) 31

Liberation News Service v. *Eastland*, 426 F. 2d 1379 (2d Cir. 1970) 15

Lillo v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Oh. 1973) 17

Local 189, United Papermakers & Paperworkers v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970) 40, 41

Local 246, Utility Workers Union of America v. *So. Calif. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970) 43

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 33

Monarch Life Ins. Co. v. *Loyal Protective Life Ins. Co.*, 326 F. 2d 841 (2d Cir. 1963), *cert. den.* 376 U.S. 952 (1964) 15

PAGE

Monroe v. *Pape*, 365 U.S. 167 (1961) 13
Muller v. *Oregon*, 208 U.S. 412 (1908) 42

N.L.R.B. v. *Cities Service Oil Co.*, 129 F. 2d 933 (2d Cir. 1942) 12
N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 14
Newmon v. *Delta Airlines*, 374 F. Supp. 238 (N.D. Ga. 1973) 17

Opp Cotton Mills, Inc. v. *Administrator*, 312 U.S. 126 (1940) 29

Parham v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970) 33
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1972) 28, 31, 35
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 15

Reed v. *Reed*, 404 U.S. 71 (1971) 19, 20, 21
Richards v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) 42
Ridinger v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Oh. 1971) *rev'd o.o.g.* 474 F. 2d 949 (6th Cir. 1972) 43
Robinson v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971) 40, 41
Roe v. *Wade*, 410 U.S. 113 (1973) 37
Rogers v. *Equal Employment Opportunity Commission*, 454 F. 2d 234 (5th Cir. 1971), *cert. den.* 406 U.S. 957 (1972) 25, 28, 30
Rosen v. *Public Service Electric & Gas Co.*, 477 F. 2d 90 (3d Cir. 1973) 25, 36
Rosenfeld v. *Southern Pacific Co.*, 444 F. 2d 1219 (9th Cir. 1971) 43

PAGE

Schaeffer v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002 (9th Cir. 1972) 41
Scott v. *Opelika City Schools*, 8 FEP Cases 272 (M.D. Ala. 1974) 17, 44
Schattman v. *Texas Employment Commission*, 459 F. 2d 32 (5th Cir. 1972), *cert. den.* 409 U.S. 1107 (1973), *reh. den.* 410 U.S. 959 (1973) 43, 44
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 37
Sprogis v. *United Airlines*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971) ..28, 31, 35, 40, 41

Udall v. *Tallman*, 380 U.S. 1 (1965) 32
Unemployment Comp. Comm. v. *Aragon*, 329 U.S. 143 (1946) 32
United Gas Improvement Co. v. *Continental Oil Co.*, 381 U.S. 392 (1965) 13
U.S. v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971) 40
United States v. *Jacksonville Terminal Co.*, 451 F .2d 418 (5th Cir. 1971), *cert. den.* 406 U.S. 906 (1972) 31
United States v. *Neifert-White Co.*, 390 U.S. 228 (1968) 12
United States v. *Roselli*, 432 F. 2d 879 (9th Cir. 1970) *cert. den.* 401 U.S. 924 (1971) 15
United States v. *St. Louis-San Francisco Railroad Co.*, 464 F. 2d 301 (8th Cir. 1972), *cert. den.* 409 U.S. 1116 (1973) 40

Veix v. *6th Ward Building & Loan Assoc.*, 310 U.S. 32 (1940) 15
Vick v. *Texas Employment Commission*, 6 FEP Cases 411 (S.D. Texas 1973) 44

Wallace v. *Debron Corp.*, 494 F. 2d 674 (8th Cir. 1974) 33, 40
Washington Terminal Co. v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1941), *aff'd* 319 U.S. 732 (1943) 12

PAGE

Webster v. *Fall*, 266 U.S. 507 (1925) 12
Weeks v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969) 36
Wetzel v. *Liberty Mutual Ins. Co.*, 372 F.Supp. 1146 (W.D. Pa. 1944) 17, 25, 26, 31, 32, 36, 40, 41, 44
Williamson v. *Lee Optical Co. of Oklahoma Inc.*, 348 U.S. 483 (1955) 21
Women in City Government, et al. v. *City of New York, et al.*, 74 Civ. 304 W.K. (S.D.N.Y.) 4
Younger v. *Harris*, 401 US.. 37 (1971) 16
Zemel v. *Rusk*, 381 U.S. 1 (1965) 14

DECISIONS OF ADMINISTRATIVE AGENCIES:

EEOC Decision No. 70-495, 2 FEP Cases 499 (Jan. 29, 1970) 30
EEOC Decision No. 71-562, 3 FEP Cases 233 (Dec. 4, 1970) 30
EEOC Decision No. 71-413, 3 FEP Cases 233 (Nov. 5, 1970) 30
EEOC Decision No. 71-1474, CCH EEOC Decisions ¶ 6221, P. 4383 (Mar. 19, 1971) 30
EEOC Decision No. 74-68, 8 FEP Cases 428 (Dec. 14, 1973) 30
Opinion of General Counsel, FEP 301:3017 (August 17, 1966) 30

CONSTITUTION, STATUTES AND REGULATIONS:

Commerce Clause, Art. 1, Section 8 14
Fourteenth Amendment 2, 10, 14, 16, 20, 21, 37, 38, 39, 41, 42, 43, 44
Civil Rights Acts, 42, U.S.C. § 1983 13

PAGE

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (Title VII) 1, 2, 3, 11, 14, 16, 17, 18, 19, 20, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

Equal Employment Opportunity Act of 1972, P.L. 92-261 .....27, 28, 32

Equal Employment Opportunity Commission Guidelines:
29 C.F.R. § 1604.9 ..... 26, 40
29 C.F.R. § 1604.10 .....30, 32, 33

Proposed Guidelines, Office of Federal Contract Compliance
33 Fed. Reg. 35336, 35338 (Dec. 27, 1973) 33

Proposed Regulations, U. S. Dept. of Health, Education & Welfare
39 Fed. Reg. 22228, 22237 (June 20, 1974) ... 33

CONGRESSIONAL MATERIAL:

Legislative History of the Equal Employment Opportunity Act of 1972, Senate Committee on Labor & Public Welfare (G.P.O. 1972) 28, 29

110 Cong. Rec. (88th Cong., 2d. Sess. 1964) 27

SECONDARY SOURCES:

American Telephone & Telegraph Company 1973 Annual Report 23, 24

Citizen's Council on the Status of Women, "Job-Related Maternity Benefits" (1970) 32

Comment, "Loves Labors Lost: New Conceptions of Maternity Leaves," 7 *Harv. Civ. Rights-Civ. Lib. Rev.* 260 (1972) 32

Cooper & Sobel, "Seniority & Testing Under Fair Employment Laws: A General Approach to Objective Criteria," 82 *Harv. L. Rev.* 1958 (1969).. 27

PAGE

EEOC 5th Annual Report (year ending June 30, 1970) 32
EEOC 6th Annual Report (year ending June 30, (1971) 32

Greenwald, "Maternity Leave Policy," *New England Economic Review* (Jan.-Feb. 1973) 23

Moody's Public Utility News Reports (Sept. 24, 1974) 24
Moody's Public Utility Manual (Moody's Investor Service, Inc. 1974 ed.), 992 23

Prentice-Hall, *Personnel Management Policies and Practices Report Bulletin* No. 16 (1973) 33

U. S. Dept. of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" Vol. I and II (G.P.O. 1972) 32
U. S. Dept. of Labor, Women's Bureau, "Fact Sheet on the Earnings Gap" (1973) 34
U. S. Dept. of Labor, Women's Bureau, "Why Women Work" (rev. ed. 1972) 34

United States Court of Appeals

For the Second Circuit

No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

Issues Presented

1. Did the Court below err in finding that the Supreme Court decision in *Geduldig* v. *Aiello*, 94 S.Ct. 2485 (1974), and particularly Footnote 20, held that distinctions involving pregnancy do not constitute discrimination based upon sex or gender in any situation absent a pretext for invidious discrimination?

2. Did the Court below err in applying the holding of *Geduldig* v. *Aiello* to the particular factual context here involving terms and conditions of employment and an alleged violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq*?

3. Did the Court below err in concluding that *Geduldig* v. *Aiello* rendered irrelevant any consideration of

A. Congressional intent in enacting Title VII, reflected in legislative history and agency interpretations, on questions of prohibited sex discrimination?

B. The disparate impact of the employer's policies on women disabled by pregnancy?

C. The difference in structure, funding, impact and costs of the employer's plan and practices here from the State insurance plan considered in *Geduldig* v. *Aiello?*

D. The different and more stringent judicial standards applied to enforcement of Title VII than those applied to a determination of reasonable State action under the Fourteenth Amendment?

Statement of the Case

Proceedings Below

The complaint below (15a)[1] was filed by plaintiffs-appellants Communications Workers of America (herein "CWA") and Esther Skipper (herein "Skipper") on July 31, 1973, alleging that defendant-appellee American Telephone and Telegraph Long Lines Department (herein "Long Lines") had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (herein "Title VII" or "the Act") by limiting the employment opportunities of its female employees. The action sought relief on behalf of all non-supervisory female employees of Long Lines who have been or may be adversely affected by policies and practices which classify women disabled by pregnancy and childbirth differently from other employees under temporary disability, and involve matters of pay-

1. Appendix references will appear in this form herein.

ments under health insurance and disability benefits plans, commencement and duration of leave, availability of extensions, reinstatement, accrual of seniority and other rights, benefits and privileges of employment.

Prior to filing of the complaint, CWA filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC" herein) involving the identical issues (48a) and received a Notice of Right to Sue (24a).

Long Lines' answer (25a) denied that its policies and practices constitute sex discrimination against plaintiffs-appellants and the class they purport to represent, but admitted that sickness and injury disability benefits are not paid for absences arising out of conditions attendant to pregnancy or childbirth (27a), and that the class which plaintiffs-appellants sought to represent numbered several thousand 26a). A number of defenses were raised under the Act, including the defense of "business necessity" (33a). Long Lines also counterclaimed (33a) against CWA based upon the collective bargaining relationship. CWA's Reply contained denials and substantive defenses under the Act and otherwise (39a).

At the time the complaint was dismissed below (4a), the Court had motions before it concerning class action treatment and separation of issues for trial (6a). Two sets of interrogatories had been propounded and answered by plaintiffs-appellants and Long Lines. A second Rule 34 Request for Production of Documents was served on Long Lines on June 17, 1974, seeking materials relating to actual costs of its policies. In view of the dismissal below, however, Long Lines did not respond to the Request. No depositions had been taken (159a).

On June 26, 1974, the parties received a letter request from the Court below requesting argument and briefs as to why the complaint should not be dismissed *sua sponte* in light of the Supreme Court decision in *Geduldig* v. *Aiello*,

94 S.Ct. 2485 (1974) (herein "*Aiello*"), and particularly Footnote 20. Briefs were filed on July 9, 1974 and oral argument heard on July 11, 1974. Plaintiffs-appellants also submitted below an affidavit of one of their counsel (159a), annexing as Exhibits excerpts from depositions taken in a companion case pending in the District Court against another Bell System employer, New York Telephone Company (herein "Telco"),[2] indicating facts relating to the operation of identical policies and practices (164a). The affidavit also annexed substantial portions of factual findings made by the EEOC in an extensive investigation of Bell System employment practices (herein "Copus Report") (185a-288a). At oral argument, counsel for plaintiffs-appellants[3] requested the opportunity to submit questions to the Court below for certification in the event of *sua sponte* dismissal. Letters were submitted to the Court by respective counsel on July 17, 1974 (300a-307a).

On July 31, 1974 the Court below issued its opinion and order, entered August 2, 1974, dismissing the complaints in both actions, with leave to replead, certifying to this Court the question of *Aiello's* applicability, pursuant to 28 U.S.C. § 1292(b) (4a-14a). A Supplemental Order was entered on August 2, 1974 including the letters of plaintiffs' counsel as part of the record herein (296a). This Court granted the Petition for Leave to Appeal on September 3, 1974.

Facts

Long Lines is an operating department of American Telephone & Telegraph Company (25a), which controls the major portion of the United States' huge telephone communications system through more than twenty subsidiary

2. *Communications Workers of America, et al.* v. *New York Telephone Co., et al.*, Index No. 73-3352 H.R.T. Pending appeal herein, proceedings in that action have been held in abeyance.

3. The Court below also heard argument from plaintiffs in *Women in City Government, et al.* v. *City of New York, et al.*, 74 Civ. 304.

companies (the Bell System) (186-187a). More than 10,000[4] women are employed by Long Lines, of which an estimated six percent take maternity leave within a one-year period (59a).

Long Lines makes available to its employees disability benefits for absences of more than seven days' duration due to the employee's inability to work. Benefits are embodied in a "Plan for Employees' Pensions, Disability Benefits and Death Benefits" (herein "the Plan"), and administered by an employees' benefits committee (85a-90a). The Plan is administered to provide fc payments to employees who are unable to work for more than seven days, regardless of whether that disability is caused by sickness, accident or otherwise (87a-89a, 296a-297a).

The Telco Benefit Committee Secretary testified that disabilities arising from cosmetic surgery, vasectomies, menopause, cures for alcoholism, cirrhosis of the liver, treatment for drugs where there is probability of rehabilitation, emphysema, lung cancer, chronic bronchitis, skiing accidents, skydiving accidents, injuries suffered in a fight, mental illness, food poisoning, attempted suicide and prostate disorders are all covered under the Plan (168a-176a). Similarly, the Secretary of AT&T's Employees' Benefits Committee testified that the Plan, in effect for each of the Bell System companies (121a, 164a), encompassed payment of benefits for absence due to disability arising from cosmetic surgery, vasectomy, treatment to cure alcoholism and treatment to cure drug addiction (177a-179a).

As stated by Telco's Medical Director:

> *"I think you have to make this clear. There is a great confusion in the employees' and in the layman's mind and in many professional minds as to the fact*

4. Long Lines' statistics on the number of women it employs have varied from 10,126 to 11,268 to 12,080 for the same time periods (94a, 142a, 155a). Thus, the 10,000 figure is approximate.

> *that we have a benefit plan which pays for disease. This is not the case. We have benefits which are paid for disabilities. . . . If you are disabled, no matter what the cause . . . you are entitled to benefits, and so you can go down any list you want and the answer is going to be yes to any condition which produces a disability, not because of the condition, because that's irrelevant, but because the impairment is sufficient to prevent the employee from doing useful work.* (166a-167a; emphasis added)

There is no dispute that a pregnant employee will be disabled for a specific period of time and unable to work.[5] However, Long Lines excludes from the Plan's protection disabilities due to normal pregnancy and childbirth (27a). This single exclusion is not specified in the Plan (see, e.g., 87a-88a), but occurs through administration by Long Lines of separate internal rules and regulations concerning pregnancy (68a-74a, 94a-95a, 98a-100a, 106a-108a, 112-115a, 138a-141a, 145a-147a, 148a, 151a-154a, 180a-184a, 280a-283a).

Long Lines classifies its disabled employees covered by the Plan as "active" employees (see, e.g., 61a, 89a-90a, 109a, 154a). Rather than protect women disabled by pregnancy under the Plan, Long Lines classifies pregnancy disabilities within its leave of absence policies (68a-74a, 282a-283a). Employees on a leave of absence are *not* considered "active" employees. Although equally disabled,

---

5. Telco's Medical Director indicated that inability to work was the key inquiry:

> Q: Do you have a definition which you use of the term "disability"?
>
> A: A working definition would be that the individual is sufficiently impaired to be unable to perform all of the duties of his or her regular work (183a).

The District Court in *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 376-377 (E.D. Va. 1974) (herein *"Gilbert"*) specifically found normal pregnancy to be disabling for periods between six and eight weeks.

these women have their employment opportunities limited in the following respects, not experienced by any other disabled employee who retains "active" status:

1. They receive no income protection from AT&T while they are actually disabled (27a, 121a).[6]

2. They are not eligible for benefit payments for any disabilities unrelated to normal pregnancy and childbirth which might arise during their leave (61a, 66a, 107a, 110a).[7]

3. They do not accrue service credit (seniority) beyond 30 days, regardless of the length of actual disability. They accrue no wage progression credit (credit toward promotion and advancement). Even if a disability arises during leave which would otherwise be covered under the Plan, no service credit is given (61a, 66a, 82a, 89a-90a, 109a, 144a-146a, 150a, 282a).

Retention of service credit has great significance to a Long Lines employee: seniority affects pension plan rights, entitlement to permanent promotion, vacation eligibility, transfer opportunities, susceptibility to lay-offs or termination, as well as the amount of disability benefits an employee receives for a covered disability (75a-79a, 80a-84a, 86a-90a, 108-113a, 280-282a, 297a). Seniority even affects eligibility for inclusion in the company's Upgrade and Transfer Plan adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminary practices against women and minorities (116a-117a).[8]

---

6. The failure to make any payments to female employees on maternity leave is further contrasted by defendant's policy to make differential payments to its employees (substantially all male) who are on military leave of absence, as well as to extend other benefits, such as service credit, to them. (See e.g., 63a, 64a, 66a-67a, 76a, 105a, 108a, 109a, 110a. 151a-152a).

7. Even under the company's insurance plan, some pregnancy expenses are excluded. (See, e.g., 91a-93a).

8. See, e.g., *E.E.O.C.* v. *A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973) and the excerpts from the "Copus Report" (185a-288a).

4. They must pay the cost of remaining within AT&T's Basic Medical Expense Plan during the period on maternity leave. Even if a disability occurs which is normally protected by the Plan, they must bear the insurance premiums themselves (60a-61a, 106a).

5. They must obtain an Application for Leave of Absence at least sixty days prior to the date when termination of active employment appears desirable, although notice of disability protected by the Plan need only be given at time of absence (*Compare* 68a and 90a). Long Lines required pregnant employees to leave work at the seventh month of pregnancy, at least until 1971 (see, e.g., 62a, 71a, 95a, 108a, 140a). Whether such a requirement still exists is a disputed fact not resolved at the time of dismissal below. The requirements that application for leave be made by the seventh month may continue, in effect, a substantially mandatory leave date at the end of the seventh month, regardless of the woman's ability and desire to continue to work.

6. They may still be subject to a Long Lines' policy which existed at least until June, 1971 which did not assure re-employment following maternity leave, and, moreover, required the woman to agree that her application be considered a voluntary termination of employment in the event that she was not re-employed (95a, 113a, 138a). This disputed factual issue is unresolved. Reinstatement is assured to other disabled employees (68a, 69a, 71a-74a, 82a, 89a, 94a-95a, 105a-106a, 113a-114a, 282a).

7. They are not protected by the Plan for complications of pregnancy (such as toxemia, ectopic pregnancy, hypertension, etc.) unless the complications occur prior to leave of absence, while the woman is still classified as an "active" employee (61a).[9]

9. Even in the specific facts of *Aiello*, complications of pregnancy were not subject to disparate treatment. 94 S.Ct. at 2489.

These limitations upon the terms and conditions of employment of Long Lines' female employees disabled by pregnancy and childbirth, and their investigation by various governmental agencies and courts, were fully presented to the Court below (see, e.g., 185a, 280a-283a).

CWA is the collective bargaining representative of all non-supervisory employees at Long Lines, as well as at other Bell System companies. Even prior to filing its Charge of Discrimination with the EEOC concerning the Company's adverse treatment of its disabled pregnant employees, CWA sought negotiations with AT&T in 1971 on this issue. Its efforts were unsuccessful (see, e.g., 49a-50a; *cf.* 84a).

Esther Skipper is a TG-3 Clerk. She has worked for Long Lines since December, 1970, and is a member of CWA. She became pregnant in 1972, began maternity leave on August 28, 1972, gave birth without complications to her first child, a daughter, and returned to work in February, 1973. Mrs. Skipper received no income protection benefits under the Plan for the period she was disabled,[10] and experienced all of the limitations upon her employment status set forth at pp. 6-8 (43a-44a, 46a-47a).

ARGUMENT

POINT I

The Court below erred in holding that Footnote 20 in *Aiello* required the conclusion that, absent invidious discrimination, classifications based upon pregnancy are never sex-based, regardless of differences in statutes involved, legislative objectives and factual contexts.

The opinion below characterizes *Aiello*, and, in particular, Footnote 20[11] as definitional for all cases involving

10. The actual period of disability suffered by Mrs. Skipper had not been developed through discovery at the time the complaint was dismissed (156a-158a).

11. Footnote 20 appears at 94 S.Ct. 2492.

classifications of pregnancy, other than those which may be found to be a "pretext" for invidious discrimination (7a, 10a). However, the specific facts involved in *Aiello* and the legal principles applied by the Supreme Court to those facts vary dramatically from those involved in the complaint dismissed below. Well-known interpretive rules preclude Aiello's applicability to the instant case. In addition, an examination of the language of Footnote 20 itself clearly demonstrates that the District Court's sweeping interpretation was not justified.

A. The Decision In *Aiello* Demonstrates That Footnote 20 Must Be Carefully Kept Within Its Particular Facts.

(1) Because the particular facts involved in *Aiello* were critical to the decision, the impact of the opinion must be limited to comparable facts.

The *Aiello* decision involved a State *insurance* program. Thus, the Court noted at the outset that "California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts." 94 S.Ct. at 2490. The language used throughout the opinion, as well as the footnote, talks in terms of insurance concepts: risks, actuarial benefits, physical conditions, aggregate risk protection, contribution rates. The challenge to omission of pregnancy-related disabilities arose under the Fourteenth Amendment; the Court exhaustively examined the State's interest in establishing the insurance program, its costs of maintaining such a program, and its objectives in making available limited funds, received from individual employee contributions, to as many disabled workers as possible without bankrupting the program or forcing the State to deplete its own resources. Extensive factual evidence was before the Court which permitted it to evaluate the presently required annual contribution rate and its relationship to the total funds dis-

posed of over its 30 years of operation, and to weigh the impact upon the total funds of adding pregnancy-related disabilities to its coverage. The Court determined that the addition of pregnancy-related disabilities in such a limited-fund situation would unduly burden the very low-income employees the insurance program was designed to assist. Thus, the Court upheld the State's objective in creating "a program to insure most risks of employment disability," even though it could not insure all risks because of its need to maintain the self-supporting nature of the program so as to distribute the available resources in a way which assured solvency and at the same time permitted "low-income employees to participate with minimum personal sacrifice." 94 S.Ct. at 2491 (see 6a-7a).

It is in this specific factual context that Footnote 20 appears and its impact must necessarily be limited to that context. Indeed, the Footnote itself states that its findings concerning reasonable legislative action on pregnancy classifications are limited to "legislation such as this," 94 S.St. at 2492.

Even in the absence of this clear guideline, by dismissing the present Title VII complaint, the Court below ignored well-known interpretive principles which limit the application of Supreme Court decisions to comparable facts. See, e.g., *Armour Company* v. *Wantock*, 323 U.S. 126 (1944), *reh. den.* 323 U.S. 818 (1945), where Justice Jackson, writing for a unanimous Court, declared:

> It is timely again to remind counsel that *words of our opinions are to be read in the light of the facts of the case under discussion.* To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of the case not before the Court. *General expressions transposed to other facts are often misleading.* (323 U.S. 132-133; emphasis added)

> *expanding its holding by a footnote dictum to eliminate municipalities as "persons" under § 1983 for the purposes of equitable relief, a question not expressly considered in the cited equitable relief cases [in the footnote].*
>
> (emphasis added)

The District Court below erred in failing to apply these well-established principles of interpretation and in dismissing the complaint in reliance on Footnote 20 as the "key" to the *Aiello* decision (7a). Footnote 20's impact should have been confined to the factual context of *Aiello*, rather than being elevated to a general principle broadly applied to the significantly different facts herein.

(2) The Supreme Court Does Not Construe Statutes Not Before It For Review.

In deciding that *Aiello* required dismissal of the Title VII complaint herein, the Court below disregarded the classic rule that Courts do not interpret statutes in a vacuum but require facts and history to ensure consistency with the purposes of the enactment.[12]

As the Supreme Court noted in *Zemel* v. *Rusk*, 381 U.S. 1, 20 (1965), declining consideration of criminal provisions of § 215(b) of the Immigration & Naturalization Act in construing the Passport Act: "[I]f we are to avoid rendering advisory opinions, adjudication of the reach and constitutionality of § 215(b) must await a concrete fact situation."

Accord: F.T.C. v. *Meyer*, 390 U.S. 341, 349 (1968); *Hudson Distributors* v. *Eli Lilly Co.*, 377 U.S. 386 (1964);

12. *Aiello*, of course, involved the Fourteenth Amendment, rather than Title VII, based on Art. 1, Sec. 8. The broad grant of power to regulate commerce is well known, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937), particularly in the area of prohibiting discrimination, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

Veix v. *6th Ward Building & Loan Assoc.*, 310 U.S. 32, 36-37 (1940); *Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969). And see *U.S.* v. *Roselli*, 432 F. 2d 879 (9th Cir. 1970), *cert. den.* 401 U.S. 924 (1971): "Precedent however is of limited value in determining the meaning of another statute, differently phrased and having its own unique legislative history."

This Circuit has consistently recognized these principles. See, e.g., *Liberation News Service* v. *Eastland*, 426 F. 2d 1379, 1383 (2d Cir. 1970); *Haberman* v. *Finch*, 418 F. 2d 664, 666 (2d Cir. 1969); *Chappell & Co.* v. *Frankel*, 367 F. 2d 197, 202 (2d Cir. 1966); *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804, 812 (2d Cir. 1966).

The necessity of examining the particular statutory language, history and context in order to ascertain the scope and meaning of an enactment has been emphasized by this Court. See, e.g., *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F. 2d 841, 845 (2d Cir. 1963), *cert. den.*, 376 U.S. 952 (1964); *Cabell* v. *Markham*, 148 F. 2d 737 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).[13]

In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973), Justice White explained why the Court avoids statutory challenges involving situations not before it:

> These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commis-

13. The Court's refusal to interpret statutes which are not before it is analagous to its traditional avoidance of broad questions of facial constitutionality where it can find a statute was merely improperly applied to the facts. See, e.g., *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Drake* v. *Covington Board of Education*, 371 F. Supp. 974, 976-977, (M.D. Ala. 1974). *Cf.* Powell, J., concurring in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 (1973): ". . . democratic institutions are weakened and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance. . . ."

> sions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 U.S. 37, 52, 27 L.Ed. 2d 699, 91 S.Ct. 746 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court. . . .[14]

The interpretation below of the impact of Footnote 20 as "preclud[ing] relief under Title VII even more clearly than under the Fourteenth Amendment" because Title VII "deals only with discrimination 'because of . . . sex.' 42 U.S.C. § 2000e(2)(a)(1)" (9a), erroneously assumed that the Supreme Court ignored the well-settled principles set forth above and determined for purposes of Title VII, admittedly not before it for decision, what does *not* constitute sex discrimination under that Act. Such a result presumed that the Supreme Court meant to ignore the vast body of law interpreting the scope of the Act's ban on sex discrimination, and the standards to be applied by the judiciary in examining employer conduct challenged under Title VII.

Such a result also required a conclusion that the Supreme Court was either unaware of, or specifically meant to overrule the substantial number of judicial decisions which had specifically found disparate treatment of pregnancy-related disabilities to be sex discrimination prohibited by Title VII. See, e.g., *Ambruster* v. *Crouse Irving Mem. Hospital*, Case No. CS-28495-72 (N.Y. State Div. of Human Rights, 1974); *Black* v. *School Committee of Malden*, 8 FEP

14. The *Younger* decision clearly notes that "The power and duty of the judiciary to declare laws unconstitutional are in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . this responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." 401 U.S. at 52.

Cases 132 (Mass. Sup. Jud. Ct. 1974); *Cf. Cedar Rapids School Dist.* v. *Parr*, 6 FEP Cases 101 (D. Iowa 1973); *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (N.D. Oh. 1973); *Farkas* v. *Southwestern City School Dist.*, 8 FEP Cases 288 (S.D. Oh. 1974); *Gilbert, supra; Hanson* v. *Hutt*, 83 Wash. 2d 195, 517 P. 2d 599 (S.Ct. Wash. 1973); *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974); *Cf. Lillo* v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Oh. 1973); *Cf. Scott* v. *Opelika City Schools*, 8 FEP Cases 272 (M.D. Ala. 1974); *Wetzel* v. *Liberty Mutual Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974) ("*Wetzel*" herein).[15] The existence of these decisions, prior to *Aiello*, makes it unlikely that the Supreme Court meant to overturn such holdings without the benefit of a full record and the specific statute involved before it.

Indeed, the Supreme Court demonstrated in *Espinoza* v. *Farah Manuf. Co.*, 414 U.S. 86, 38 L.Ed. 2d 287 (1973) that an interpretation of the scope and intent of a Title VII definition of a protected classification (national origin) required a full record, an exhaustive examination of legislative history and agency interpretations, review of comparable enactments, plus statistics and evidence concerning the particular employer whose policies were the subject of the Title VII challenge. As noted in Point III, *infra*, at pp. 26-33, the legislative history with regard to the ban against sex discrimination is persuasive that differential treatment of pregnancy *is* sex discrimination prohibited by the Act. The Supreme Court decision in *Aiello* cannot be reasonably interpreted as ruling on this issue, without any record

15. One District Court decision, *Newmon* v. *Delta Airlines*, 374 F. Supp. 238 (N.D. Ga. 1973), had reached a contrary result insofar as pregnancy disability payments were concerned although it did find that the employer's leave and reinstatement policies violated the Act. However, *Newmon* turned on insufficient facts and has since been settled. *Gilbert* and *Wetzel* are now on appeal to the Fourth and Third Circuits, respectively.

before it and without *any* reference to Title VII or to the many decisions noted above.[16]

B. In Any Event, Footnote 20 Merely Declares That Classifications Based Upon Pregnancy Are Not *Necessarily* Sex-Based, And Specifically Permits The Legislature To Make A Determination That Such Classifications Are Sex-Based.

The District Court below flatly decides that *Aiello* has held for all purposes that, absent pretext, "distinctions involving pregnancy do not constitute discrimination because of sex . . ." (7a). However, the very language of the footnote belies so sweeping and final a conclusion. The Court stated "it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification," necessarily implying that *some* classifications will be held to be sex-based. The Court goes on to note that, absent pretext, "*lawmakers* are constitutionally free to include or exclude pregnancy from the coverage of *legislation such as this* on any reasonable basis . . ."

The Congressional enactment of Title VII clearly falls within the Supreme Court's specific approval of legislative *inclusion* of pregnancy classifications within prohibited sex discrimination in employment. In addition, the very expression of legislative freedom to differentiate based upon pregnancy limits that freedom to "legislation such as this," i.e., a state insurance program with the factual basis and legislative objectives involved in California's limited, worker-funded insurance scheme. The Court's explicit limitation of its analysis of pregnancy classifications to the type of insurance legislation before it could not be clearer, particularly in view of the vast differences presented by such classifications in the employment context which ex-

16. The *only* mention of Title VII, by way of analogy, is contained in the dissenting opinion of Brennan, J., 94 S.Ct. at 2494-2495. The mere reference in Footnote 20 to the dissenting opinion is hardly sufficient to conclude that the Supreme Court was ruling upon a totally different statute, and a totally unique area of law, without some formal acknowledgment of such an intention.

tend to every aspect of the disabled woman's employment relationship.

Consequently, the proper interpretation of Footnote 20 is that in the context of a State disability insurance program, legislative exclusion of pregnancy-related disabilities is *not necessarily* sex discrimination per se, absent pretext. However, in the employment context, classification of pregnancy in a manner which limits terms, conditions and benefits of employment for a group of female employees has been included by Congress as a form of sex discrimination prohibited by Title VII. (See Point III) Nothing in Footnote 20 suggests that such a legislative inclusion was improper. Indeed, nothing in Footnote 20 supports the view that the Supreme Court addressed itself to this unique and different legislative decision in an area unrelated to the legislation challenged in *Aiello.*

C. The References In Footnote 20 To *Reed* and *Frontiero* Indicate The Importance Of Proffered Legislative Objectives In Determining Whether Differential Treatment Is Based On "Gender As Such."

The opinion below states that ". . . if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would be clearly inapplicable to a case arising under Title VII where no such deference is required" (9a). However, it is clear that the *Aiello* Court's holding *was* based upon deference to the objectives of California's program, and it was that deference, in the particular facts of the case, which led the Court to conclude that the differential treatment afforded pregnancy was not discrimination based solely on sex. In view of the critical significance given the State's objectives by the Supreme Court, 94 S.Ct. at 2490-2492, the dismissal below, without

reviewing any comparable evidence of objectives, was premature, even assuming, *arguendo*, that *Aiello* applies to Title VII.

When the discussion in Footnote 20 is viewed in the context of *Reed* v. *Reed*, 404 U.S. 71 (1971) (herein "*Reed*") and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (herein "*Frontiero*"), cited twice by the Court in the Footnote, the significance of legislative objectives is further highlighted. These two cases, which were the Court's most recent treatment of classifications based upon sex in the Fourteenth Amendment context, demonstrate that the legislative objectives advanced by California to support excluding pregnant women from its insurance plan were sufficient to justify the differential treatment, where they had been insufficient in *Reed* and *Frontiero* to justify differential treatment of women.[17]

In *Reed*, a unanimous Court held that Idaho could not, under the Fourteenth Amendment, prefer men over women in appointments to administrate decedents' estates merely because to do so reduced the workload of State probate courts. Administrative convenience alone was held insufficient to justify treating similarly circumstanced individuals differently because of sex. See 404 U.S. 76-77. In *Frontiero*, the Supreme Court looked to the objectives of a statute precluding women in the military from claiming their husbands as dependents without proof of their "dependency" upon their wives for over one-half their support when no similar proof was required for men. It found that

17. The opinion below characterized Footnote 20 as "in answer to arguments presented by the dissenting justices" (7a). The dissent stressed its belief that *Reed* and *Frontiero* had classified sex as a "suspect classification" warranting strict judicial scrutiny under the Fourteenth Amendment. The majority indicated that *Reed* and *Frontiero* involved legislative classifications which were "based upon gender as such" and not upon any appropriate policy considerations which have traditionally justified legislation involving non-"suspect" classifications.

"the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere administrative convenience," 411 U.S. at 688, and was therefore unable to hold that such an objective was sufficient to justify differential treatment of women.[18]

Footnote 20 thus stresses the difference between the "administrative convenience" objective advanced in *Reed* and *Frontiero* and the significant legislative objectives cited in the text of *Aiello* (94 S.Ct. at 2491-2492). Weighed against administrative convenience, the classifications in *Reed* and *Frontiero* were based on "gender as such." Weighed against California's "need to reconcile the demands of its needy citizens with the finite resources available to meet those demands,"[19] the classifications in *Aiello* were not based on "gender as such."

Footnote 20 was intended to provide a fuller understanding of the importance of legislative objectives which go beyond administrative convenience. By contrasting *Reed* and *Frontiero* with the serious objectives present in *Aiello*, the Court indicated when such objectives can determine the nature of a classification so as to overcome a challenge under the Fourteenth Amendment. Footnote 20 merely explains why some pregnancy classifications may be permissible, under Fourteenth Amendment standards, where the state has advanced policy objectives which are not grounded solely upon "administrative convenience."

---

18. "Our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency.' Stanley v. Illinois, 405 U.S. 645, 656. . . ." 411 U.S. at 690.

19. *Dandridge* v. *Williams*, 397 U.S. 471, 472 (1970). The *Aiello* Court relied exclusively upon *Dandridge*, *Jefferson* v. *Hackney*, 406 U.S. 535 (1972) and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), all of which concerned social welfare programs and "finite resources," 94 S.Ct. at 2491. The Court below had no similar facts before it. See pp. 22-25, *infra*.

POINT II

The Court below erred in failing to consider the differences between the facts herein and those relied upon in *Aiello* and in failing to reach the issue of whether Long Lines' policies discriminated in terms and conditions of employment in violation of the Act.

A. Long Lines' Disability Plan And Policies Significantly Differ From That Considered In *Aiello* In Structure, Funding, Costs And Impact.

California's disability insurance fund permitted employees within the State, after contributing the required one percent of their salary up to an $85.00 annual maximum, to receive benefit payments for time lost from their jobs due to disability. The fund, administered by the State, was, for the almost 30 years of its operation, totally self-supported by the annual contributions of the State's workers, furthering a State interest in continuing the solvency of the program at a minimum contribution level. See 94 S.Ct. at 2487-2488.

Long Lines' policies here present a striking contrast to the California program. Employees do not contribute any portion of their salary to the company; the Plan is employer funded, offered to its employees as a benefit of their employment at AT&T. Income protection is available to all disabled employees, except women disabled by pregnancy, under a formula related to length of service and salary (85a-90a, 296a-297a). California had only a limited amount of monies at any time from which to compensate disabled workers, but Long Lines protects its disabled workers through disability payments which vary during each fiscal year according to the number of employees disabled during that year (89a).

Because of the limited fund examined in *Aiello*, costs played a major role in the Supreme Court's decision to up-

hold the insurance program. See 94 S.Ct. at 2490-2491. The Court below, however, had *no* evidence of Long Lines' program costs before it. Significantly, the only figures on costs submitted to the District Court were Bell System averages, which did not even include the Long Lines' experience, and which failed to reveal present costs (118a-137a, 296a-298a).[20]

Bell's projected system-wide costs of eight weeks of pregnancy benefits were said to be $15,767,666 in 1970-1971 and $19,037,330 in 1971-1972 (129a-130a). However, these projected figures lose even their tenuous factual value in the context of this particular Company where only 35% of its employees are women (298a), as compared to almost 49% in the Bell System (122a-123a). In, addition, costs are relevant, if at all, only as relating to benefit levels. The translation of wage increases into benefit levels diminishes the significance of these figures substantially. CWA, for example, has found that a one cent wage increase per hour equals $11,000,000 in benefits (51a).[21]

Further, in contrast to the impact of increased coverage in *Aiello* upon the solvency of California's insurance fund, defendant's costs must be viewed in the context of AT&T's constantly rising *profits*. The 1973 Annual Report of AT&T states at p. 3:

> In 1973, revenues rose 13 per cent over 1972 and net income applicable to AT&T common shares in-

20. *Compare* 94 S.Ct. at 2490-2491. Discovery efforts had not revealed at the time of dismissal whether the company bears the full costs of the Plan or uses an outside insurance carrier for some or all costs. According to *Moody's Public Utility Manual* (Moody's Investor Service Inc., 1974 ed.) p. 992, AT&T pays "full cost of pension and benefit programs except for supplemental group life insurance." (See 89a). Thus the Plan appears to be identical to that held invalid in *Gilbert*.

21. And see Greenwald, "Maternity Leave Policy," *New England Economic Review*, Jan.-Feb. 1973, pp. 13-18, annexed as Exhibit 4 to Plaintiffs' Supplemental Answers to Defendant's First Interrogatories.

> creased by 18 per cent. Earnings per share from operations were $4.98 as compared to $4.34 a year ago. This was the highest percentage increase in earnings the Bell System has achieved since 1950.

In August, 1974, AT&T's profits were still rising. Operating revenues rose from $23,527,320,000 to $25,376,524,000; net income increased from $2,993,526,000 to $3,149,233,000; and average earnings per share went from $5.06 to $5.26. See *Moody's Public Utility News Reports* (September 24, 1974), p. 186, and 1973 Annual Report, p. 2.

Whatever considerations may properly apply to governments trying to improve the status of their citizens with limited resources certainly do not apply to an employer whose profits apparently know no limit.[22] Long Lines' refusal to provide equal benefits to women disabled by pregnancy thus arises in a context totally at odds with *Aiello*.

Moreover, the California insurance plan did not affect terms and conditions of employment of the women denied insurance payments because of pregnancy disabilities. As noted above at pp. 6-8, Long Lines' differential treatment of women disabled by pregnancy adversely affects them in many ways in addition to the denial of income protection during the period they are unable to work: ineligibility for benefit payments for any other disability arising during maternity leave; cessation of service credit and pension credit after 30 days; loss of paid Basic Medical Expense insurance; pressure, if not compulsion, to begin non-paid maternity leave at the seventh month of pregnancy regardless of desire or ability to continue working; and possible termination of employment. Long Lines' refusal to treat women disabled by pregnancy equally to other disabled

22. AT&T's profit picture is particularly significant in light of the Copus Report finding that its discrimination against women alone saved it $500 million per year (286a).

employees deprives this class of women of substantial employment benefits available to all other employees.[23]

These factual differences between the California insurance plan and Long Lines' policies toward its female employees disabled by pregnancy clearly demonstrate that the Court below erred in finding that *Aiello* warranted dismissal of the Title VII challenge herein.

B. Long Lines' Disability Plan And Policies Are Terms And Conditions Of Employment Within The Scope of Section 703(a) of Title VII.

Section 703(a) of Title VII of the Act provides that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ... or
>
> (2) to ... classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex....

Long Lines' policies concerning pregnancy disabilities are clearly *employment* practices subject to Title VII. See *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186 (7th Cir. 1971), *cert. den. sub nom, Drewrys U.S.A., Inc.* v. *Bartmess*, 404 U.S. 939 (1971); *Rosen* v. *Public Service Electric Co.*, 477 F. 2d 90, 94-95 (3rd Cir. 1973); *Cf. Hackett* v. *McGuire Brothers, Inc.*, 445 F. 2d 442 (3rd Cir. 1971). Indeed, employment benefits are often of equal or greater significance to an employee than wages. See *Rogers* v. *Equal*

23. See, e.g., *Gilbert, supra*, 375 F. Supp. at 382; *Wetzel, supra*, 372 F. Supp. at 1162-1163.

Employment Opportunity Commission, 454 F. 2d 234, 238 (5th Cir. 1971), *cert. den.* 406 U.S. 957 (1972).

The Guidelines of the Equal Employment Opportunity Commission specifically state at 29 C.F.R. § 1604.9 that:

(a) "Fringe benefits," as used herein includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans, leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

Various District Courts have found that failure to pay benefits to women disabled by pregnancy violates Title VII. See, e.g., *Wetzel, supra; Gilbert, supra; Farkas* v. *Southwestern City School Dist., supra, Dessenberg* v. *American Metal Forming Co., supra; Hutchison* v. *Lake Oswego School Dist., supra.* Long Lines' classification of female employees disabled by pregnancy as "inactive," thereby limiting or denying benefits afforded to disabled male employees clearly violates § 703(a)(2) of the Act. The Court below erred in failing to reach these issues by applying *Aiello* which neither involved nor considered terms and conditions of employment covered by Title VII.

POINT III

The Court below erred in failing to consider the Congressional intention in Title VII to eliminate sex discrimination in terms and conditions of employment which included discrimination based upon pregnancy, an inclusion recognized by *Aiello* as appropriate for the legislature to make.

In enacting Title VII, Congress took a broad view of problems relating to employment discrimination and determined to cover the entire field, rather than proceed one step at a time. *Cf. Aiello*, 94 S.Ct. at 2491. Congress dele-

gated to the Equal Employment Opportunity Commission significant fact-finding and enforcement authority to carry out its broad intent to proscribe all discriminatory practices in terms and conditions of employment. The EEOC's rulings and regulations have concluded that the practices at issue here violate Title VII. Thus, the broad language of Title VII, the expansive intent of Congress in passing the Act, and the legislative and administrative agency history over the past nine years all reflect that the lawmakers intended broad legislative coverage of employment discrimination, including discriminatory treatment of women disabled by pregnancy. This type of legislative freedom was specifically recognized by the Court in *Aiello*.

A. Congress Intended Title VII's Prohibition Against Sex Discrimination To Include All Facets of the Employment Relationship.

The legislative history behind passage of the Act in 1964, and the Equal Employment Opportunity Act of 1972, amending Title VII, P.L. 92-261 (herein "1972 Amendments"), demonstrates that Congress intended to broadly proscribe differences in treatment between men and women.

Congress twice rejected amendments to limit proscribed discrimination by inserting the term "solely" before all the prohibited categories of discrimination (110 Cong. Rec. 2728, 13837). Senator Magnuson noted that such an amendment "would so limit this section as probably to negate the entire purpose of what we are trying to do" *Id*, 13837.[24]

24. The breadth of Congressional intent is reflected in the language of Title VII itself. Use of the words "in any way", "tend to deprive" or "otherwise adversely affect" in describing unlawful practices prohibited by § 703 of Title VII, has been described as manifesting a Congressional "intention to define discrimination in its broadest possible terms." Cooper & Sobel, *Seniority & Testing Under Fair Employment Laws: A general approach to objective criteria*, 82 Harv. L.Rev. 1958, 1612 (1969).

The broad scope of Title VII has been repeatedly affirmed by the courts. See, e.g., *Rogers* v. *Equal Employment Opportunity Commission*, *supra*, 454 F. 2d at 238, finding that Title VII was intended to be a "charter of principles which are to be elucidated and explicated by experience, time and expertise." *Sprogis* v. *United Airlines*, 444 F. 2d 1194 (7th Cir. 1971) *cert. den.* 404 U.S. 991 (1971); *cf. Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1972).

Passage of the 1972 Amendments further confirmed Title VII's broad application to problems of discrimination based on sex. Both Senate and House Committee Reports on S.2515 and H.R. 1746, respectively, 92nd Cong. 1st Sess., and the debates, demonstrate that Congress intended multivaried, complex and deeply ingrained practices and policies, such as those in question here, to be prohibited sex discrimination. See, generally, *Legislative History of the Equal Employment Opportunity Act of 1972*, Sen. Committee on Labor & Public Welfare (G.P.O. 1972) (herein "Leg. Hist.") compiling the complete history in both House and Senate Committees and debates.

Congress recognized EEOC's progressive involvement in the problems of sex discrimination and its need for enforcement powers":

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> "Such blatant disparate treatment is particularly objectionable in view of the fact that Title VII specifically prohibited sex discrimination since its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself

> in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings. Leg. Hist., p. 65

Congress also indicated its reliance upon the EEOC for education about subtle forms of sex and race discrimination, and the weight given to EEOC findings. See, e.g., Leg. Hist. p. 414; 671-672:

> . . . Title VII litigation requires specialized knowledge and expertise. *The one agency which has the necessary experience and expertise to deal with the multitude of issues and variations of employment discrimination is the EEOC.* Through its experience of the past 6 years, it has developed an experienced staff and a wealth of information which provides the expertise needed to deal with the various aspects of employment discrimination. The courts, while recognizing that the EEOC has no enforcement powers, have nonetheless acknowledged the agency's qualifications and have frequently stated that EEOC opinions are entitled to great weight in subsequent judicial interpretations, and many a case has been decided on the basis of the arguments presented by EEOC attorneys in amicus briefs filed with the courts." Leg. His. at 672
>
> (emphasis added)

B. The EEOC Determination That Differential Treatment Of Pregnancy By An Employer Violates Title VII Expressed The Intention Of Congress To Prohibit Such Conduct.

Congressional delegation to the EEOC of power to analyze employment practices and determine prohibited employment discrimination under the Act, has long been recognized by the Courts. See, e.g., *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 145 (1940):

> In an increasingly complex society Congress obviously could not perform its functions if it were

> obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy. . . . The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

See also *Rogers* v. *Equal Employment Opportunity Commission, supra*, 454 F.2d at 238; Leg. Hist., p. 410-411, 413-417.

EEOC's decisions have uniformly held that discrimination by employers because of pregnancy is discrimination because of sex in violation of Title VII.[25] Its Guidelines on Sex Discrimination, 29 C.F.R. § 1604.10, clearly state that differential treatment of pregnancy disabilities violates Title VII:

> Sec. 1604.10 Employment policies relating to pregnancy and childbirth.
>
> (a) A written or unwritten employment policy of practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
>
> (b) *Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes,*

25. See e.g., Opinion of General Counsel, FEP 301:3017 (August 17, 1966); EEOC Decision No. 70-495, 2 FEP Cases 499 (Jan. 29, 1970); EEOC Decision No. 71-562, 3 FEP Cases 233 (Dec. 4, 1970); EEOC Decision No. 71-413, 3 FEP Cases 233 (Nov. 5, 1970); EEOC Decision No. 71-1474, CCH EEOC Decisions ¶ 6221, P. 4383 (Mar. 19, 1971); EEOC Decision No. 74-68, 8 FEP Cases 428 (Dec. 14, 1973).

> *temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.* Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave, plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. (emphasis added)

The Court below never reached these Guidelines, apparently believing that *Aiello* had made the findings of the responsible administrative agency regarding the coverage of Title VII irrelevant, despite the fact that Title VII was not before the Supreme Court and the great weight and deference given EEOC Guidelines by the Courts in determining whether employer practices violate the Act. See, e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971) (herein "*Griggs*"); *Phillips* v. *Martin-Marietta Corp.*, *supra*, 400 U.S. at 545; *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971), *cert. den.* 404 U.S. 950 (1971); *Bartmess* v. *Drewrys U.S.A., Inc.*, *supra*, 444 F. 2d at 1190 (7th Cir. 1971); *Sprogis* v. *United Airlines, Inc.*, *supra*; *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418, 456 (5th Cir. 1971), *cert. den.* 406 U.S. 906 (1972); *Gilbert*, *supra*, 375 F. Supp. at 381; *Wetzel*, *supra*, 372 F. Supp. at 1159; *Leisner* v. *N.Y. Telephone Co.*, 358 F. Supp. 359, 368 (S.D.N.Y. 1973).[26]

Consistent with its reliance upon the factual analysis of EEOC concerning discriminatory employer policies, Con-

26. This Circuit in *Green* v. *Waterford Board of Education*, 473 F. 2d 629, 637, n. 19 (2d Cir. 1973) noted that the EEOC Guidelines provided "additional support" for its holding that a forced maternity leave policy violated the Fourteenth Amendment.

gress receives annual reports. The agency's findings that differential treatment of women disabled by pregnancy is sex discrimination under Title VII have regularly been included. See, e.g., EEOC 5th Annual Report (year ending June 30, 1970), p. 14; 6th Annual Report (year ending June 30, 1971), pp. 11-12. Since the EEOC enforcement powers granted in the 1972 Amendments were based, in part, on the Commission's progressive work on problems of sex discrimination, Congress clearly did not disagree with these findings. Long Lines relies upon *Espinoza* v. *Farah Manuf. Co., supra*, 414 U.S. 86, 94-95, to question the wisdom of 29 C.F.R. § 1604.10. However, *Espinoza* merely holds that deference to an administrative interpretation will not be given where there are "compelling indications that it is wrong." No such indication exists here. Even if legislative intent is unclear, an agency interpretation is entitled to deference if it promotes the objectives of the statute. See *Unemployment Comm.* v. *Aragon*, 329 U.S. 143, 151 (1946); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Gilbrt, supra*, 375 F. Supp. at 381; *Wetzel, supra*, 372 F. Supp. at 1159.

Moreover, 29 C.F.R. § 1604.10 resulted from EEOC's own step-by-step analysis of disparate treatment of pregnancy. See, e.g., Comment, "Love's Labor Lost: New Conceptions of Maternity Leaves," 7 *Harv. Civ. Rights—Civ. Lib. Review*, 260, 269, n. 54 (1972). The Copus Report, issued prior to the Guidelines, indicated the discriminatory impact of Bell System pregnancy policies (280a-283a). In 1970 the Citizen's Council on the Status of Women adopted a statement of principles on "Job-Related Maternity Benefits" (Exhibit 6 to Plaintiffs' Supplemental Answers to Defendant's First Interrogatories) detailing the adverse consequences of such policies.[27] The Guidelines are

27. The major food, automobile, steel and some electrical industries all pay disability benefits to women disabled by pregnancy for six to eight weeks. See U.S. Dept. of Labor, Bureau of Labor Statis-

(Footnote continued on next page)

consistent with Congressional intent, amply supported by facts, and should not have been disregarded below.

POINT IV

The Court below erred in failing to consider Title VII standards in order to determine whether Long Lines' policies constituted impermissible sex discrimination.

A. Long Lines' Disparate Treatment of Women Disabled By Pregnancy Is A *Prima Facie* Violation of Title VII.

The exclusion of women disabled by pregnancy from the Long Lines' disability program has a disparate impact upon a group of employees protected by Title VII. These women receive disparate treatment in income protection payments, and in promotion, transfer and pension rights, insurance coverage and job security, including reinstatement and freedom from termination. Disparate impact is *prima facie* violative of Title VII. See, e.g., *Griggs, supra; Wallace* v .*Debron Corp.*, 494 F. 2d 674, 675-676 (8th Cir. 1974); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426-428 (8th Cir. 1970); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

The disparate impact of the Long Lines' policy toward pregnancy disabilities extends beyond denial of the employment benefits discussed at pp. 6-8. Women in the employ of the Bell System are notoriously underpaid (See 185a-

---

(Footnote continued from previous page)

tics, "Digest of Health & Insurance Plans" Vol. I and II (1972), (cited in Defendant's Answer No. 15 to Plaintiffs' Second Interrogatories). See also Prentice-Hall, *Personnel Management Policies & Practices Report Bulletin* No. 16 (1973) detailing extensive compliance with the Guidelines' mandate. (Plaintiffs' Supplemental Answers to Defendant's First Interrogatories 12 and 13). Proposed Guidelines of the Office of Federal Contact Compliance, 38 Fed. Reg. 35336, 35338 (Dec. 27, 1973), and proposed Regulations of H.E.W., 39 Fed. Reg. 22228, 22237 (June 20, 1974) are virtually identical to 29 C.F.R. § 1604.10.

288a, *esp.* 209a-211a, 277a-280a, 283a-288a). Thus, in 1970-1971 the average weekly wage of women with two-to-five years' seniority in the System was $111.75 (128a).[28] The Copus Report pointed out that 80% of Bell's female employees hold job classifications with a basic annual wage of less than $7,000 as compared to only 4% of its male employees. On the other end of the wage scale, only 3% of the System's women earned $13,000 per year or above (209a-210a). The Report concluded that "Bell's incumbent female employees, given their age, education and experience, are paid an aggregate of $500 million per year less than males with comparable personal characteristics" (286a).

Disparate impact thus exists at two levels—(1) limitations upon terms and conditions of employment of a class of women at Long Lines because of a biological fact which is "inextricably sex-linked," *Gilbert, supra*, 375 F. Supp. at 381, and (2) in the face of existing wage discrimination, burdening of this class of women with further economic hardships at a time when income protection is most important.[29]

---

28. The marginal wages paid to women are, unfortunately, mirrored by the business world generally. The annual wage of working women in 1970 was 60 percent of that earned by men. Women's Bureau, U.S. Department of Labor, *Fact Sheet on the Earnings Gap* (1973). See, generally, Women's Bureau, U.S. Department of Labor, *Why Women Work* (Rev. ed. 1972).

29. The Court in *Aiello* clearly expressed its concern for low-income workers in California most likely to rely upon the State's insurance program, 94 S.Ct. at 2492. And in *Kahn* v. *Shevin*, 94 S.Ct. —, 40 L.Ed 2d 189, 192 (1974), the Supreme Court indicated a particular concern for the economic condition of women:

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.

The Court below determined that sex discrimination was not involved in Long Lines' policies toward women disabled by pregnancy by applying the *Aiello* description in Footnote 20 of two groups of potential insurance recipients —"pregnant women and non-pregnant persons," noting that the latter group contained men and women (7a, 10a). However, such a description is not the critical consideration under Title VII. Discrimination prohibited by the Act is determined by whether *all* employees, regardless of sex, have equal access to terms and conditions of employment. The Supreme Court has held that Title VII is violated if a sub-class of women are differently treated. See *Phillips* v. *Martin-Marietta Corp., supra,* where an employer was forbidden to deny employment to women with pre-school age children although such a rule did not apply to single women and mothers of school-age children as well as to men. The logical extension of the "condition" of pregnancy—motherhood—was held an impermissible classification.

In *Sprogis* v. *United Airlines, supra,* 444 F. 2d at 1198, the employer attempted to justify prohibiting stewardesses from marrying by arguing that only one "unique" position in the Company was affected. The Court held:

> "The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. *The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties*

> *possessed by one sex* (cf. Cheatwood v. South Central Bell Telephone and Telegraph Co. 303 F. Supp. 754, 759-760 (M.D. Ala. 1969) *or through the unequal application of a seemingly neutral company policy.*

Similarly, in *Doe* v. *Osteopathic Hospital of Wichita, Inc.*, 333 F. Supp. 1357, 1362 (D. Kans. 1971) Title VII was held to preclude an employer's discharge of an unmarried pregnant employee despite the employer's argument that its policy was non-discriminatory, since it did not discriminate in favor of "pregnant, unmarried men." *Cf. Drake* v. *Covington County Board of Education, supra.*

In the employment area, differential treatment of pregnancy plagues working women with the continuing hardships of marginal wages, limits their development of skills and training, forces them to remain in the least responsible jobs, and subjects them to constant threat of layoffs and termination. Providing equal access to the job market for men and women is the objective of Title VII. See *Diaz* v. *Pan American World Airways, Inc., supra*, 442 F. 2d at 386; *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 235 (5th Cir. 1969); *Rosen* v. *Public Service Electric & Gas Co., supra*, 477 F. 2d at 95.

Long Lines has not simply removed a condition—pregnancy—from insurance coverage. It has determined that a substantial number[30] of its female employees will not have equal access to terms and conditions of employment, because of their reproductive function which, although begun with equal participation by men, disables them alone. The result of Long Lines' policies is that "women are required to undergo the economic hardship of the disability which arises

30. The Court in *Wetzel* noted that pregnancy was "a natural, expectable and societally necessary condition" with a certainty in a "statistically predicable number of women in the labor force," 372 F. Supp. at 1157-1158.

from their participation in the procreative experience,"[31] *Gilbert, supra,* 375 F. Supp. at 381. As Judge Mehrige pointed out:

> *If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce.*
> (375 F. Supp. at 383; emphasis added)

Since *Aiello* did not address disparate impact under Title VII, the Court below erred in applying that decision to the Long Lines' employment policies challenged herein.

B. *Aiello* Involved Presumptions And Burdens Of Proof Entirely Different and Less Stringent Than Those Applied Under Title VII.

The deliberate acts of a State in providing social welfare programs for its citizens are presumed, under Fourteenth Amendment standards, to be constitutional. If such legislative acts are reasonable and in furtherance of a legitimate policy objective, the Fourteenth Amendment defers to legislative wisdom in the absence of deliberate and intentional discrimination. The Supreme Court has repeatedly enunciated these long-standing presumptions of legitimacy. See, e.g., *Dandridge* v. *Williams, supra,* 397 U.S. at 485, upon which the *Aiello* Court relied:

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws

31. Employer policies such as Long Lines' subvert the freedom of working women to decide whether to bear children which is protected from both government and employer interference. See, e.g., *Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542 (1942); *Griswold* v. *Connecticut,* 381 U.S. 479, 484-485 (1965); *Eisenstadt* v. *Baird,* 405 U.S. 438, 453-454 (1972); *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973); *Hanson* v. *Hutt, supra; Drake* v. *Covington Bd. of Educ., supra,* 371 F. Supp. at 978-979.

> are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality.... The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.... (citations omitted)

Aiello relied exclusively upon such deference, noting that the Equal Protection Clause permits the State to "take one step at a time" in addressing itself to social problems, and to "select one phase of one field and apply a remedy there, neglecting the others," rather than forcing it to "choose between attacking every aspect of a problem or not attacking the problem at all." 94 S.Ct. at 2491, (citations omitted).[32]

In direct contrast, Title VII does not permit such presumptions of legitimacy for challenged employment practices and affords no similar deference to employers. The inquiry under Title VII is *effect;* where a policy has a disparate impact on a protected class it is presumed invalid. The Supreme Court's interpretation of Title VII in *Griggs, supra,* 401 U.S. at 431-432, makes this clear:

> The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation.
>
> * * *
>
> Congress directed the thrust of the Act to the *consequences* of the employment practices, not simply the motivation.[33]

---

32. As shown in Point III, *supra,* Congress was determined in Title VII to broadly attack the problem of employment discrimination.

33. This view of the Act was reaffirmed in the Court's latest discussion of Title VII in *Espinoza* v. *Farah Manuf. Co., supra,* 94 S.Ct. at 338: ". . . Title VII prohibits discrimination . . . whenever it has the purpose or *effect* of discriminating on the basis of national origin." (emphasis added)

See also *Gilbert*, *supra*, 375 F. Supp. at 381; *Hutchison* v. *Lake Oswego School District*, *supra*, 375 F. Supp. at 1060: "Title VII standards are more compelling because they place a statutory mandate upon the employer."

This Circuit in *Green* v. *Waterford Board of Education*, *supra*, 473 F. 2d at 634, held that a Fourteenth Amendment challenge "requires careful analysis not only of the *effect* of the claimed discrimination but also of *the degree to which the discriminatory classification furthers legitimate state interests*" (emphasis added), and weighed a forced maternity leave rule against state interests in the health or safety of the teacher and her unborn child, continuity of education, and administrative convenience.[34]

Long Lines claimed that "business necessity" justified its limitation of the employment opportunities of women disabled by pregnancy (33a). However, this defense under Title VII is far more stringent than the furtherance of state interests test acknowledged in *Green*, and applied in *Aiello*. The Supreme Court noted in *Griggs*, *supra*, 401 U.S. at 431, that "business necessity" was the key to determining whether practices "fair in form" nonetheless violated Title

34. The *Green* Court was forced to give the defendants "the benefit of the doubt" as to "any legitimate interest arguably promoted by the rule" because of the insufficient record before it on the summary judgment disposition below: ". . . a principal problem on this appeal is an altogether abbreviated record, consisting of little more than plaintiffs' verified complaint, defendant's answer, a few short interrogatories, the argument on the motion for a preliminary injunction, and the district judge's opinion." 473 F. 2d at 634. In the view of the Court below, if *Aiello* was definitional for Title VII purposes, further facts were unnecessary, particularly in the context of certifying the question to this Court. Given the District Court's opinion that differential treatment of pregnancy was a Title VII violation "pre-*Aiello*," and could not, by definition, be a violation after that decision unless a pretext for invidious discrimination, plaintiffs-appellants agreed that this legal interpretation should be resolved prior to trial on the merits (*Cf.* 11a-13a).

VII. This Circuit defined the defense in *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971):

> . . . [T]he "business necessity" doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. Clearly such a result is not correct under Title VII. Jones v. Lee Way Motor Freight, Inc. 431 F. 2d 245, 249 (10th Cir. 1970). Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals.

See also, *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796-800 (4th Cir. 1971); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, 989 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 877 (6th Cir. 1973); *United States* v. *St. Louis-San Francisco R. Co.*, 464 F. 2d 301, 308 (8th Cir. 1970), *cert. den.* 409 U.S. 1116 (1973); *Sprogis* v. *United Airlines*, *supra*, 444 F. 2d at 1201.

Wallace v. *Debron Corp.*, *supra*, 494 F. 2d at 677 characterized the employer's Title VII burden as requiring, at the very least, proof that a policy to discharge employees subject to multiple garnishments fosters employee productivity *and* that no ". . . acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact'. . . ." See also *Gregory* v. *Litton Systems, Inc.*, 472 F. 2d 631 (9th Cir. 1972). The burden to prove "business necessity" is *not* carried by claims of cost. See, e.g., *Robinson* v. *Lorillard*, *supra*, 444 F. 2d at 799, n. 8; *Gilbert*, *supra*, 375 F. Supp. at 382; *Wetzel*, *supra*, 372 F. Supp. at 1162-1163; 29 C.F.R. § 1604.9(e).

C. "Pretexts for Invidious Discrimination" In The Context Of *Aiello* Are Very Different Under Title VII Where Motive And Intent Have Limited, If Any, Relevance.

By the very nature of the deference given to State statutes which have a humanitarian or remedial purpose, reasonableness permits all but intentional discrimination to prevail over a Fourteenth Amendment challenge to a non-"suspect" classification. The exception noted in Footnote 20 of *Aiello* that lawmakers were free to exclude or include pregnancy in State insurance programs "absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or another" was thus within traditional Fourteenth Amendment standards. However, invidious motives or intent have little relevance to Title VII violations.

As noted by Judge Wisdom in *Local 189, United Papermakers* v. *Paperworkers* v. *United States, supra*, 416 F. 2d at 996:

> "[T]he statute [§ 706(g)], read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."

Accord: Kober v. *Westinghouse Electric Corp.*, 480 F. 2d 240, 246 (3d Cir. 1973); *Schaeffer* v. *San Diego Yellow Cabs*, 462 F. 2d 1002, 1006 (9th Cir. 1972); *Sprogis* v. *United Airlines, supra*, 444 F. 2d at 1201; *Robinson* v. *Lorillard Corp., supra*, 444 F. 2d at 796; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 250 (10th Cir. 1970), *cert. den.* 401 U.S. 923 (1971); *Wetzel, supra*, 372 F. Supp. at 1163.

"Neutral" practices may be a "pretext for invidious discrimination" under Title VII since willfulness is not required. In *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431, the Supreme Court indicated that "neutral" practices

must be eliminated if they "*operate* invidiously to discriminate on the basis of racial or other impermissible classification." Even assuming that the pretext exception in Footnote 20 of *Aiello* could properly be applied beyond the factual and legal context of that case to a Title VII challenge, it must be concluded that either all challenges showing disparate impact come within the exception or the exception is meaningless for Title VII cases since discriminatory or evil motives are not required under the Act. Indeed, in *Griggs*, *supra*, 401 U.S. at 432, Chief Justice Burger stated that:

> [W]e do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built in headwinds" for minority groups and are unrelated to measuring job capability.

D. Title VII Has Been Consistently Construed As Prohibiting Classifications Which May Not Violate The Fourteenth Amendment.

The Court below declined to hold that sex discrimination "means something different when the Fourteenth Amendment is involved than when Title VII comes into play" (9a). However, such has been the conclusion of many Courts which have struck down discriminatory practices under the Act.

State protective laws restricting employment opportunities of women, held constitutionally permissible in *Muller* v. *Oregon*, 208 U.S. 412 (1908), have been repeatedly struck down under Title VII. *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Ore. 1969) rejected *Muller*, noting that:

> Except in rare and justifiable circumstances, 42 U.S.C. § 2000 e-2(e), the law no longer permits

either employers or the states to deal with women as a class in relation to employment; 29 C.F.R. § 1604.1 (a). Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sexual groups. *The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act.* 42 U.S.C. 2000 e-7. (emphasis added)

Accord: Ridinger v. *General Motors Corporation*, 325 F. Supp. 1089, 1097 (S.D. Oh. W.D. 1971); *rev'd o.o.g.* 474 F. 2d 949 (6th Cir 1972); *Local 246, Utility Workers Union of America* v *So. Calif. Edison Co.*, 320 F. Supp. 1262, 1266-1267 (C.D. Cal. 1970); *LeBlanc* v. *So. Bell Telephone and Telegraph Co.*, 333 F. Supp. 602, 609 n. 5 (E.D. La. 1971); *aff'd*, 460 F. 2d 1228 (5th Cir. 1972), *cert. den.* 409 U.S. 990 (1972); *Rosenfeld* v. *So. Pacific Co.*, 444 F. 2d 1219, 1226 (9th Cir. 1971); *Garneau* v. *Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 715 (7th Cir. 1969).

Krause v. *Sacramento Inn*, 479 F. 2d 988, 990 (9th Cir. 1973) held that an employer's reliance upon a state alcoholic beverage law provision limiting employment in that field to men only, "patently offended Title VII . . ." yet such an enactment was held permissible under the Fourteenth Amendment in *Goesart* v. *Cleary*, 335 U.S. 464 (1948).[35] In *Schattman* v. *Texas Employment Commission*, 459 F. 2d 32 (5th Cir. 1972), *cert. den.* 409 U.S. 1107 (1973), *reh. den.* 410 U.S. 959 (1973), decided prior to the 1972 Amendments covering employment practices of governmental

35. The opinion below suggests that the different results are "more readily explained by the respective dates of decision . . ." than by substantive difference (9a). However, as recently as 1970 *Goesart* was cited by the Supreme Court in *Dandridge* v. *Williams, supra*, 397 U.S. at 485.

agencies, the Court upheld, on Equal Protection grounds, challenged maternity policies of the State's employment agency. Thereafter, in *Vick* v. *Texas Employment Commission*, 6 FEP Cases 411, 414 (S.D. Tex. 1973), *Schattman* was held *not* determinative of the statutory challenge under Title VII.

The stricter standards of Title VII have been recognized and applied to differential treatment of female employees disabled by pregnancy. See *Wetzel, supra*, 372 F. Supp. at 1159:

> We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. *While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII.* (emphasis added)

Accord: Hutchison v. *Lake Oswego School District, supra*, 374 F. Supp. at 1060-1061;[36] *Gilbert, supra*, 375 F. Supp. at 381. In *Scott* v. *Opelika City Schools, supra*, 8 FEP Cases at 276, the Court had only a Fourteenth Amendment challenge before it, but noted that "[i]f this case were being litigated under Title VII, defendants' maternity leave treatment would be unable to stand."

These judicial standards, which affect presumptions, burdens of proof and justifications in a Title VII action, were not involved in *Aiello* and should not have been ignored by the Court below.

---

36. The *Hutchison* decision made the difference between a Title VII and Fourteenth Amendment action clear, noting that various defenses offered by the School District might be "asserted as defenses to a claim under the Equal Protection Clause," but were "not valid defenses to a Title VII action." 374 F. Supp. at 1061.

CONCLUSION

For all the reasons stated above, it is respectfully submitted that the order of the District Court should be reversed in its entirety.

Respectfully submitted,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
1370 Avenue of the Americas
New York, New York 10019

KANE & KOONS
1100 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs-Appellants

On the Brief:*
CHARLES V. KOONS
H. HOWARD OSTRIN
JONATHAN W. LUBELL
MARY K. O'MELVENY

October 31, 1974

* Plaintiffs-Appellants appreciate the assistance of Barbara Schain, 3d year law student, Rutgers University.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

Plaintiffs-Appellants,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

On Appeal from The United States District Court for The Southern District of New York

---

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Sarita Puebla, being duly sworn, deposes and says: That she is over twenty-one years of age: That on the 31st day of October 1974 she served two copies of the attached Brief For Plaintiffs-Appellants on each of the following named by enclosing said copies in fully post-paid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 150 Christopher Street, New York City, New York.

Thompson Powers, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Linda Colvard Dorian, Esq.
Equal Employment Opportunity Commission
General Counsel
1206 New Hampshire Avenue
Washington, D.C. 20007

Sarita Puebla
Sarita Puebla

Sworn to before me this

SERVICE OF ~~THREE~~ Two (2) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 31st DAY OF Oct 1974

J. G. Kilpatrick

Attorney(s) for RMW